Supreme Court, U.S.
FILED

02 - 4 JUN 2 6 2002

OFFICE OF THE CLERK

No.

IN THE

# Supreme Court of the United States

Martin E. Bruetman,

*Petitioner,*

*versus*

Diego J. Herbstein,

*Respondent.*

On Petition for Stay to
United States Court of Appeals
for the Seventh Circuit

## PETITION FOR WRIT OF CERTIORARI

Martin E. Bruetman, Pro Se
77 W. Huron St. # 214
Chicago, Illinois 60610
(312) 944 0782

Balmar Legal Publishing Services Falls Church, VA 22042, (703) 289-9000

## QUESTIONS PRESENTED

Whether the District Court and the Court of Appeals failed to conduct a *de novo* review of the questions of law raised on appeal regarding the automatic stay, when the underlying proceeding is the granting of a summary judgment motion, as required by well-established principles of appellate jurisprudence recognized by the Courts of Appeals and the Supreme Court.

Whether the Courts below erred when they upheld, 1) the entry by the Bankruptcy Court, in a Chapter 7 proceeding, of a general discharge order pursuant to 11 U.S.C. Sect. 727 while there were unresolved pending claims under Sect. 727 and 523 (a) of the Bankruptcy Code; 2) subsequently, in conflict with the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure, the carrying on of proceedings to determine the dischargeability of a debt; and 3) the entry of an order retroactively lifting the automatic stay to the date of the entry of the general discharge order, these actions being in conflict with the provisions of Sections 362 (a), and (c), 727, and 523 of the Code.

Whether the Court of Appeals and the District Court have erred by upholding the standing before the bankruptcy estate in a Chapter 7 proceeding of a creditor, who admittedly failed willfully, knowingly and by design to file a Proof of Claim, as prescribed by Federal Rules of Bankruptcy Procedure 3001 (f) and 3002, the Bankruptcy Reform Act of 1994 and the Supreme Court opinion In Raleigh Chapter 7 Trustee v. Illinois Department of Revenue, 120 S. Ct. 1951 (2000).

Whether the Court of Appeals has deprived Petitioner of the due process of law or abused its discretion by denying his motion to take judicial notice of the bankruptcy decision to enforce the automatic stay in another proceeding involving the debtor, thereby preventing Petitioner from placing undisputed material factual matter before the court.

Whether the Courts below have allowed for a potential legal conflict of interest between client and attorney without a waiver by the client.

## PARTIES TO THE PROCEEDING

The parties are the same as the listed in the cover page. No Corporate parties are involved.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

PARTIES TO THE PROCEEDING ..... iii

TABLE OF CONTENTS ..... iv

TABLE OF AUTHORITIES ..... vi

OPINIONS BELOW ..... 1

JURISDICTIONAL STATEMENT ..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS ..... 2

STATEMENT OF THE CASE ..... 2

The Supplementary Proceedings ..... 3

REASONS FOR GRANT THE WRIT

The Decision by the District Court and the Court of Appeals conflict with opinions of the Supreme Court, Courts of Appeals, Statutes and Policies ..... **6**

Failure to observe *De Novo* Standard ..... 6

Violation of 11 U.S.C. Section 362. Automatic Stay ..... 11

Affirming a Discharge Order Pursuant to 11 U.S.C. 727 While Pending Sections 727 and 523 Objections; Judicial Estoppel. Forum Shopping. ..... 12

Dischargeability and the Automatic Stay ..... 14

Violation Cooperation Policy Among Creditors Principle ..... 15

Respondent Standing as Creditor after failing to file Proof of Claims ..... 16

Judicial Notice. Depriving due Process of Law ..... 18

Conflict of Interest by Respondent's Counsel by asserting Counsel Legal Position Defending its Own Interest Contrary to Client's Interest in Detriment of Petitioner ..... 19

CONCLUSION ..... 19

APPENDICES

Court of Appeals Order ..... A1

Court of Appeals Denying Petition Rehearing En Banc ..... A3

District Court Order ..... A4

Bankruptcy Court Denying Sanctions Pursuant 11 U.S.C. 362 ..... A6

Bankruptcy Order Dismissing Plaintiff's 11 U.S.C.727 claims ..... A7

Court of Appeals Denying Motion to take Judicial Notice ..... A 9

Statutory Provisions ..... A10

Discharge Order ..... A19

Transcription June 11, 2001, hearing ..... A20

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

*Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. at 501, 104 S. Ct. 1949, at 1959, 80 L. Ed. 2d 502 (1984). ..... 6

*Bratton v. Roadway Package Sys. Inc.*, 77 F.3d 168, 173 n.1 (7th Cir. 1996). ..... 18

In Re Bruetman, 259 B.R. 649 (2001) ..... 5

*Cardillo v. Moore-Handley, Inc.*, 172 B.R. 146. (Bkrtcy. Court N.D. Georgia 1994) ..... 14-15

In Re C&S Grain Co., 47 F. 3d 233,236 (7th. Cir. 1995) ..... 10

In re Embry 10 F. 3d 401 (6th. Cir. 1993) ..... 9-14

*Citizens for a Better En't-Cal. V. Union Oil Co.* 861 F. Supp 889, 896 (N.D. Cal. 1994) *Affirmed* 83 F. 3d 1111 (9th. Cir. 1996) ..... 18

*Gagan v. American Cablevision, Inc.* 77 F.3d 952, 965 (7th. Cir 1996) ..... 18

In Re Gleenwood Medical Group, Ltd. 211 B.R. 282 (Bank. Court N.D. Ill. 1997) ..... 16

*Halas v. Platek*, 239 B.R. 784 N.D. Ill. (1999) ..... 11

*Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678 (1989) ..... 10

*Hartford Acc. Co. v. Chicago Hosing Authority*, 1991 WL 38692 (7th. Cir. 1991) ..... 14

In re Hausladen *146 B. R. 557 (Bankr. D. Minn.)* ..... 16

In Re Hulvey, 102 B. R. 703 (C.D. Ill. 1988 ..... 14

*Investors Credit Corp. v. Batie* (In re Batie) 995 F.2d 85, 88 (6th. Cir. 1993) ..... 6

In re Lefkas G. Partners N 1017, 153 B.R. 804 (N.D. Ill. 1993) ..... 17

*Levinson v. United States* 969 F. 2d 260, 264-65 (7th Cir. 1992) ..... 13

*Locicero v. Leslie* 948 F. Supp 10, 12 (D. Mass. 1996) ..... 18

*Moody v. Amoco Oil Co.* 734 F.2d 1200, 1210 (7th. Cir.) *cert. Denied*, 469 U.S. 982 105 S. Ct 386, 83 L.Ed.2d 321 (1984) ..... 6-7, 10

*Ogden Martin Systems of Indianapolis, Inc. v. Whiting Corp.* 179 F.3d 523 (7th. Cir. 1999.) ..... 13

*Pioneer Investment Services Co. v. Brunswick Associates, Ltd. Partnership*, 113 S. Ct. 1489*389 (1993) ..... 16

*Pelfresne v. Village of Williams Bay*, 917 F. 2d 1017, 1023 (7th. Cir 1990) ..... 18

*Raleigh, Chapter 7 Trustee, v. Illinois Department of Revenue* 120 S. Ct. 1951 (2000) [FN2] ..... 16-17

*Salve Regina College v. Russell*, 111 S. Ct. 1217 (1991) ..... 6

*Sheldon v. Munford, Inc.* 902 F.2d 7 (7th.Cir.1990) ..... 15

*State of New Hampshire v. State of Maine* 121 S. Ct. 1808 (2001) ..... 13

*Shugrue v Air Line Pilots Ass'n, Int'l* (In re Ionosphere Clubs, Inc) 922 F. 2d 984, 988 (2nd. Cir. 1990) *cert. Denied*, 502 U.S. 808, 112 S. Ct. 50, 116 L.Ed. 2d (1991) ..... 6

11 U.S.C.A 362(a) ..... 11

*U.S. v. Marren*, 890 F. 294 (7th. Cir. 1989) ..... 18

In re Tucker 174 B.R. 732 (N.D. Ill.1994) ..... 16

In Re Wigoda 234 B.R. 143*416 (N.D.Ill. 1999) ..... 16

In re Zimmerman 156 B.R. 192 (Bankr. W.D.Mich 1993) ..... 16

**STATUTORY PROVISIONS**

28 U.S.C. 1254 (1) ..... 2
28 U.S.C. section 1334(b) ..... 2
28 U.S.C. section 1291 ..... 2
Fed. Rules Bk. P. 3001(f) ..... 18-19
Fed. Rules Bk. P. 3002 ..... 18-19
Fed. Rules Bk. P 4004 ..... 5-9
Fed. Rules Bk. P. 4006 ..... 18
Fed. Rules Bk. P 7001 ..... 9-13
Fed. R. Civ. 54(b) ..... 5-15
Fed. R. Civ. P. 69 (a) ..... 2-3
Illinois Supreme Court Rule 277 (a) (f) ..... 2-6
Fed. Rules of Evidence 201(a) (b) (c)(f) ..... 18
11 U.S.C. 362 ..... *passim*
11 U.S.C. 501 ..... 7-19
11 U.SC. 502 ..... 7-19
11 U.S.C. 523 ..... *passim*
11 U.S.C. 524 ..... 10-12
11 U.S.C. 726 ..... 18
11 U.S.C. 727 ..... *passim*

Petitioner respectfully petitions for a Writ of Certiorari to review the judgments and opinions of the Seventh Circuit Court of Appeals and the Courts below.

## OPINIONS OF COURTS BELOW

The Unpublished Order by the United States Court of Appeals for the Seventh Circuit entered on April 5, 2002, on case No. 01-3587, denying Appellant's Appeal is set forth in the Appendix hereto[1] (App. A 1)

The Order by the United States Court of Appeals for the Seventh Circuit which denied a timely filed Petition for Rehearing En Banc, entered on April 30, 2002, is set forth in the Appendix hereto. (App. A 3)

The Order by the District Court for the Northern District of Illinois, Eastern Division, entered on September 6, 2001, affirming the Opinion-Order rendered by the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division is set forth in the Appendix hereto (App. A 4)

The Order dated June 18, 2001, by the Bankruptcy Court denying Bruetman's motion to clarify the June 13, 2001 is set forth in the Appendix hereto (App. A 6)

The Order dated April 24, 2001, by the Bankruptcy Court dismissing without prejudice Counts III, IV & V is set forth in Appendix hereto. (App. A7)

The Order dated March 6, 2002, denying request to take Judicial Notice is set forth in Appendix hereto. (App. A 9)

---

[1] The footnote in the order "related appeal" misleads regarding the matter. The issue was an appeal from a different District Court order; the Court of Appeals entered its opinion on February 21, 2001 and the Bankruptcy Court entered its final opinion on March 8, 2001. The parties are the same but the underlying case was not a bankruptcy matter.

## JURISDICTIONAL STATEMENT

The jurisdiction of the District Court for Northern District of Illinois was invoked pursuant to Fed. R. Civ. P. 69 (a) and Illinois Supreme Court Rule 277 (a) and (f).

The jurisdiction of the United States Bankruptcy Court for the Northern District of Illinois was invoked pursuant to 28 U.S.C. section 1334(b).

The Jurisdiction of the United States Court of Appeals was invoked pursuant to 28 U.S.C. section 1291.

The United States Supreme Court jurisdiction is pursuant to 28 U.S.C. section 1254(1).

## STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1954 (1); 28 U.S.C. section 1334(b); 28 U.S.C. section 1291;Fed. R. Civ. 54(b);; Fed. R. Civ. P. 69 (a); Illinois Supreme Court Rule 277 (a), (f); Fed. Rules Bk. P. 3001(f); F. Rules Bk. P. 3002; Fed. Rules Bk. P. 4004(a) and(b), 4006, 7001(4); 11 U.S.C. 362; 11 U.S.C. 501 and 502; 11 U.S.C. 523; 11 U.S.C. 524; 11 U.S.C. 726; 11 U.S.C.727; F. Rules of Evidence 201(a),(b and)(f).

## STATEMENT OF THE CASE

The present matter is a multi-litigation multi-jurisdictional case between the parties which was begun in 1989 in Argentina, in the Criminal Division Federal Justice of Argentina, case # 89-51761, Bruetman as the plaintiff, and in the Commercial Division of the Civil Courts of Argentina, case number 18109/89, Herbstein as the Plaintiff.

Litigation in the U.S. against Bruetman and others was brought by Herbstein as plaintiff, in the United States District Court for the Southern District of New York, in the case captioned "Diego J. Herbstein v. Martin E. Bruetman, et al.," case number 89 Civ 6864. Honorable Judge Sweet entered a default judgment against the defendant and others ordering the plaintiff to recover the sum $2,737,924.40 with interest as

provided by law, and costs. It was registered in the United States District Court for the Northern District of Illinois, Eastern Division, as case number 92 C 7948, pursuant to Rule 69 (a) of the Fed. R. Civ. P. Plaintiff begun discovery proceedings in January 1993.

**The Supplementary Proceedings.**

The following list of dates and sequence of legal proceedings is material to the effect of providing clarity to a convoluted set of legal actions and their effects.

Herbstein on December 4, 1992 commenced supplementary proceedings to enforce the New York judgment. Mrs. Bruetman was deposed once, in June 1993, and the Court terminated her deposition in September 1993. No proceedings took place between January 1994, and October 1998.

Bruetman appeared for examination on February 5, 1999 and tendered all documents under his control and possession. Herbstein's attorney had never retrieved nor had in his possession the documents Bruetman tendered in June 1993, despite a Court order entered on September 23, 1993. In order to allow Herbstein's attorney to examine new documentation, the parties agreed on a new session to conclude the examination. Counsel for both parties also began settlement negotiations. During the negotiations Herbstein's counsel filed a motion to hold Mrs. Bruetman in contempt and asked for her incarceration.

On March 22, 1999, Bruetman, to avoid further harassment to his family that had begun in 1992 in Boston, Mass.,[2] filed for protection under Chapter 7 of the Bankruptcy

---

[2] In a footnote the Bk. Court, although that the case fails to meet the essential element required for taking judicial notice, cites the case in which Herbstein had to withdraw the injunctive motion supported by a perjurious affidavit. This is one of multiple similar harassing legal proceedings around the world including the United States, which had similar outcome, supported by similar documentation.

Code in the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division. (R. 99B09107 Docket # 1.) The District Court received the notification of the automatic stay pursuant to 11 U.S.C. Section 362(a) and on April 7, 1999 dismissed all claims and motions with leave to reinstate on or before November 2, 1999.[3]

On June 25, 1999, pursuant to 11 U.S.C. 523 (a) and 727 Herbstein filed an Adversary Complaint to determine dischargeabilty and to deny. (R. 99 A 00811, Docket # 1)

On July 8, 1999, the Bankruptcy Court entered an order discharging Bruetman pursuant to 11 U.S.C. 727. Creditors and all parties were served on July 9, 1999. (App. A19)

On August 27, 1999 the Bankruptcy Court struck Herbstein's Adversary Complaint ordering to refile it by September 24, 1999. (R. 99A811 Dock. # 14.)

On October 4, 1999, Herbstein filed a five-count Amended Adversary Complaint, Counts I & II under 11 U.S.C. 523 (a) and III, IV & V under 11 U.S.C 727. (R. 99A811 Dock. # 21.) Plaintiff supported the late filing as follows: "while counsel was generally familiar with those proceedings, the Plaintiff initially retained him long after that judgment [false] in that case and only to collect the judgment and not to review the complex facts underlying it"[4]

On May 10, 2000, the Bankruptcy Court entered an order lifting the automatic stay for a limited purpose with concurrence of Herbstein's counsel.

---

[3] Failure to reinstate dismissed claims with leave to reinstate by the due date is a dismissal with prejudice and has Res Judicata effect. Reinstatement of claims does not violate Sect. 362 of the Bk.Code if there is no attempt to enforce.

[4] Counsel was retained before the New York case was closed. Counsel filed the Adversary Complaint without reviewing the "complex" case despite the 90 days time lag between Bankruptcy filing and Adversary Complaint filing and the F. Rules B. P 4004 (b) that allows for an extension of time if requested.

On August 3, 2000, the bar date for filing proof of claims expired. Herbstein never filed a proof of claim.

On March 8, 2001, the Bankruptcy Court granted Herbstein's Motion for Summary Judgment on Counts I & II of the Amended Adversary Complaint; certified pursuant to Fed.R. Civ. P. 54 (b), and denied Bruetman's Cross Motion for Summary Judgment. In Re Bruetman, 259 B.R. 649 (2001)

On March 22, 2001, the Bankruptcy Trustee issued a final no-asset report pursuant to the report by an appointed court accountant.

On April 24, 2001, the Bankruptcy Court entered an order dismissing without prejudice Counts III, IV & V (App. A7). On May 3, 2001, nine days later, Herbstein's counsel filed a motion with the District Court to dismiss Buetman's appeal because Counts III, IV &V were still pending. (District Court case 01-2829)

On May 10, 2001, Herbstein filed with another Judge of the District Court a motion to compel Bruetman to complete the examination to discover assets and for leave to reexamine Mrs. Bruetman pursuant to Illinois Supreme Court Rule 277. (Dist. Court case # 92-7948)

On June 1, 2001, Bruetman filed a motion asking sanctions against Herbstein's counsel for violation of 11 U.S.C. sect. 362. (Bank. Court 99A00811 Dock. # 172)

On June 11 and 13, 2001, the Bankruptcy Court held hearings and ruled that Bruetman had been discharged on July 8, 1999 pursuant to 11 U.S.C. 727 and the automatic stay was lifted as of that date. (App. A 6 & A 20; page 11 below)

On March 5, 2001, the same Bankruptcy Court had entered the Stipulation and Agreed Order of Dismissal in the case caption "Martin E. Bruetman v. Social Security Administration and its Commissioner" for violation of 11 U.S.C. Section 362. (Case 00A00945 dock. #10)

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

### THE DECISIONS BY THE DISTRICT COURT AND THE COURT OF APPEALS CONFLICT WITH OPINIONS OF THE SUPREME COURT AND COURTS OF APPEALS, STATUTES, AND POLICIES

*De Novo* Standard

In reviewing a bankruptcy court's decision, the district court functions as an appellate court. The case at bar involves an appeal from an order related to the granting OF summary judgment. A bankruptcy court's decision to grant summary judgment is purely a question of law. Investors Credit Corp. v. Batie (In re Batie), 995 F.2d 85, 88 (6th. Cir. 1993). Since a bankruptcy court's conclusions of law are subject to plenary review by the district court, that court must conduct a *de novo* review of the bankruptcy court's decision to lift the stay. Shugrue v Air Line Pilots Ass'n, Int'l (In re Ionosphere Clubs, Inc., 922 F. 2d 984, 988 (2nd. Cir. 1990), *cert. Denied*, 502 U.S. 808, 112 S. Ct. 50, 116 L.Ed. 2d (1991).

*De novo* review requires the district court to make an independent examination of the bankruptcy court's judgment without giving deference to that court's analysis or conclusions. Moody v. Amoco Oil Co., 734 F.2d 1200, 1210 (7th. Cir.) *cert. Denied,* 469 U.S. 982, 105 S. Ct 386, 83 L.Ed.2d 321 (1984). "When a *de novo* review is compelled, no form of appellate deference is acceptable" Salve Regina College v. Russell, 111 S. Ct. 1217 (1991). The difference between a rule of deference and the duty to exercise independent review "is much more than a matter of degree" Bose Corporation v. Consumers Union of United States, Inc., 466 U.S. at 501, 104 S. Ct. 1949, at 1959, 80 L. Ed. 2d 502 (1984).

The Court of Appeals did not observe the *de novo* standard. In its unpublished order it did not mention the standard observed, but by merely affirming the district court

opinion, which has failed to observe the standard, it may be concluded that a *de novo* review has not been conducted. Therefore the argument will refer mainly to the District Court opinion.

The District Court in its short opinion failed to address any of presented material and relevant issues of law: validity and scope of the discharge order of July 8, 1999 and its subsections, standing as creditor before the estate, and standard of review applied.

In Moody *1210 the District Court conducted two hearings, affidavits were submitted, the court stated in its opinion that it examined the entire record before the bankruptcy court and gave no deference to the bankruptcy court's findings and conclusions. In the case at bar the District Court not only failed to hold oral arguments despite Bruetman's request, but also failed to state if the records have been reviewed. Further, in Moody the court clarifies that what is critical is not the form but the process that the court uses in reviewing the bankruptcy court's opinion. The Court also concludes that it is preferable for the "District Court to write separately to express its views on complex and novel issues." The case at bar contains complex and novel issues; certainly that to grant a general discharge order, continue the proceedings for two years in spite of pending claims subsequent to entering the general discharge order, which was not revoked, and retroactively effect the lift of the stay in bankruptcy proceedings, constituted a complex and novel issue. Id. Moody *1210. The District Court's Order (App. A 4) states that it has disposed, in a companion Memorandum Opinion, (case No. 01-3583) of the appeal of a granted summary judgment motion. A matter of law the stay is related and demands a *de novo* review.

The District Court Order describes the events as follows: "On July 8, 1999, the Bankruptcy Court entered an order discharging Bruetman's debts." In the same paragraph: "Plaintiff Herbstein filed an Amended Adversary Complaint on June 25, 1999..." The Order does not identify the Code

Section under which the discharge was entered. The District Court erred by failing to identify the sections because as of July 8, 1999, there were pending three counts under Sec. 727 and two under Section 523 of the Code. Such error suffices for the Court Opinion to fail. It is also material as matter of law to state which Section is invoked, Sec. 523 and/or 727 of the Code, since Sec. 362 (c) lists only three exceptions and no one refers to Sec. 523.

In its Memorandum Opinion regarding the motion for summary judgment (page 5) the District Court states: "On March 22, 1999 Bruetman filed a petition in bankruptcy in the Northern District of Illinois." "The Bankruptcy Court entered an order discharging Bruetman's debts on July 8, 1999. Following the discharge Herbstein initiated an Adversary Complaint."

The contradictions and errors are evident. Herbstein did not file an Amended Adversary Complaint on June 25, 1999 (record), he filed it on October 4,1999. The Federal Rules of Bankruptcy Procedure 4004 (a) and 7001 conflict with the filing of an adversary complaint after debtor has been discharged, except in very specific circumstances not present here. Ergo, there is not evidence of a *de novo* review and the records have not been properly reviewed. If it has been performed there is a significant error of law.

The District Court Order in its third paragraph shows also that significant misstatement of Bruetman's appeal: "Bruetman maintains that he is entitled to a stay subsequent to Bankruptcy Court's order discharging his debts. Such a proposition flies in the face of express statutory language and defies common sense." If Bruetman had maintained such a legal assertion it would have not been a meritless appeal, it would have been a frivolous appeal. However the District Court's conflicting description of events as pointed out above, followed by a conclusory opinion, which has no statutory support, and its description of Bruetman's appeal, is erroneous. Bruetman contends that meanwhile there is one

claim pending and it is being litigated, it is against the Code provisions that the automatic stay be lifted.

The District Court opinion is limited to quote the 11 U.S.C Sec. 362 (a) and 362 Sec. (c)(2)(C) and then concludes that the Bankruptcy Court was correct in denying the motion to stay pending appeal, since Bruetman had been discharged two years prior to the motion, and the stay had been lifted at that time. Erroneously the District Court concludes that to find otherwise would unfairly hamper the collection efforts of creditors, who have patiently awaited resolution of the discharge proceedings.

Following such line of reasoning the District Court has nullified the most significant section of the Bankruptcy Code. The dischargeability proceedings referred to in its order have become a purposeless legal exercise. New law has been created; the Cooperation Policy Among Creditors Principle and the Principle that only one discharge order is issued are nullified. On the other hand, if the District Court is correct 11 U.S.C 524 protects Bruetman from his creditors, they became ex-creditors. Isn't it a Judicial Paradox?

Evidence that the Courts below had not observed the *de novo* standard is confirmed by the transcripts of the June 11, 2001, hearings. "The Bankruptcy Court Did Not Allow Herbstein's Citation To Go Forward." (App. A 20) The Bankruptcy Court refers to In re Embry 10 F. 3d 401 (6th Cir. 1993) regarding the issues of dischargeabilty and the automatic stay ruling that it "will not permit to go forward with the citation..." Further, the Court and Mr. Glasgow (Herbstein's counsel) agreed that Bruetman had not been discharged.

Two days later, June 13, 2001, hearing, Mr. Steck (also Herbstein's counsel);

> MR. STECK:...He [Bruetman] received a discharge from this court in 1999. A discharge order was entered. I have a copy of that here as well.

THE COURT: May I have it please (July 8, 1999, Discharge Order is handled to the Court) (App. A 19)

ME. STECK: And by virtue of that order

THE COURT: Oh, he has.

The mere comparison of the pertinent part of the transcripts demonstrates the inconsistencies of Herbstein's counsels' legal position and the bad faith of its representations by withholding material legal information from the Court. It also demonstrates a gross error by the Court, which failed to check the docket, as well as the statements by the Court and Mr. Glasgow, of two days earlier, prior to rendering any opinion. The Court had acknowledged that shortly before the hearings it had entered a dismissal of the Counts under Sec. 727 of the Code. Yet the Counts already had been dismissed as part of the Discharge Order, dated July 8, 1999, an evident contradiction. (App. A19).

*De novo* review requires the district court to make an independent examination of the bankruptcy court's judgment Id. Moody. A De *Novo* review involves an independent review of the entire record. Harte-Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678 (1989). There is no presumption of correctness as to the Bankruptcy Court's conclusion of law, which are reviewed *De Novo.* In Re C&S Grain Co., 47 F. 3d 233,236 (7th. Cir. 1995).

A debtor objecting to his discharge? The appeal presented such a paradox. Bruetman has not objected to being discharged; on the contrary Bruetman considers that all the legal data allows concluding that a discharge order would have ample support. However, the discharge must meet the Code requirements and because the Courts erred, the proceedings have been unnecessarily prolonged; the Courts below have left Bruetman in legal limbo due to the created legal paradox. The Courts below missed the legal point.

**11 U.S.C. Section 362. Automatic Stay**

Section 362 is the central provision of the Bankruptcy Code. Section 362 prevents creditors from taking further actions against a debtor except through the bankruptcy courts. Section 362 levels the field and prevents a debtor being harassed and allows creditors, as a group, to have access to debtor assets in an orderly fashion. Halas v. Platek, 239 B.R. 784 N.D. Ill. (1999).

Automatic stay is nearly comprehensive stay of any actions to collect debt from debtor. 11 U.S.C.A. Sec. 362 (a) Because automatic stay is so comprehensive, it is advisable for creditors to seek permission from the bankruptcy court even before filing compulsory counterclaim. Id.

The significance of Section 362 is demonstrated by the 1984 Congress overhaul of the Bankruptcy Act when it explicitly added paragraph (h) to Section 362, providing teeth to the remedial actions. The overhaul did not change Sec. 524.

11 U.S.C. 362 (c)(2)(C) controls the lifting of the automatic stay. The District Court states:

> "The Bankruptcy Code provides an automatic stay to those who file bankruptcy petitions in order to stop collections of debts until the merits of the bankruptcy termination are determined. See 11 U.S.C 362 (a). That stay is lifted, however, upon the entry of a discharge order. See. Sec. 362 (c) (2)(C) (stating that for Chapter 7 petitions, the stay continues until a discharge is granted or denied). The Bankruptcy Court granted the discharge of Bruetman's debts on July 8, 1999. As of that date, the stay was terminated." (App. A 4)

The Court having the option, it chose "granted" rather than "denied". The evolution of the proceedings post July 8, 1999, controverts the District Court conclusion of law. Accepting the District Court opinion nullifies the essence of the Bankruptcy Code. May Adversary Proceedings continue

despite the entry of a general discharge order and the lifting of the automatic stay? May the automatic stay be lifted when 11 U.S.C 727 and 523 (a) claims are pending? The general Discharge Court Order of July 8, 1999, is pursuant to Sect. 727 of the Code, the only Section that governs the issuing of discharge orders, and has not been revoked nor objected to pursuant to F. Rules Bk. P. 7001(4), therefore, the interpretation is that the Section 523 counts have been discharged.

Discharge Order pursuant to 11 U.S.C. 727; pending Section 523 objection; Judicial Estoppel, Forum Shopping.

The Discharge Order was pursuant to 11 U.S.C.727. Debts under 11 U.S.C. 523 are excepted from discharge under Sec 727. In this case the facts do not support the existence of an exception. The Discharge Order was pursuant to Sec. 727 although the Adversary Complaint had three counts under Sec. 727 and two under Sec. 523. A general Discharge Order under Sec. 727 cannot be entered if are Sec. 523 claims pending, and if entered it must be revoked. The Bankruptcy Court's failure to note such contradiction on June 13, 2001, confirms that its action is a manifest error of law affirmed by the District Court and the Court of Appeals. (Tr. 6/13/01.) which affect also the rest of the creditors.

Herbstein's counsel asserted on June 13, 2001, that Bruetman's discharge took place on July 8,1999. On June 13, 2001 counts III, IV and V, which were under Sec. 727, were not pending; they had been discharged on July 8, 1999. It would be an exceedingly novel legal theory allowing for the dismissal of claims without prejudice, which already the court has discharged pursuant to Sec.727. The only counts that might be pending were I and II, which were under Sec. 523. If a count objecting to discharge under Title 11 is still pending the automatic stay remains in effect. If the automatic stay has been lifted as of July 8, 1999, counts I and II also have been included within the July 8, 1999 discharge order; any other conclusion is against operation of law.

Herbstein's attorney acted in bad faith by asserting in his defense that sanctions under 11 U.S.C. 362 were not applicable since Bruetman had been discharged, and consequently the automatic stay had been lifted two years earlier. By accepting such conclusion and the District Court agreeing with it the adversary proceedings have been an exercise of futility. By a simple review of the Docket the Courts below would have reached the correct conclusion. The Court of Appeals by failing to properly review the case confirmed the error of law.

How do the Courts below legally reconcile that on July 8, 1999, a general discharge order pursuant to Sect. 727, was entered, on April 19, 2001, a motion for the dismissal of the 727 counts (III, IV & V) is filed and granted on April 24, 2001? The least that may be said is that such legal actions are incongruent. But, on May 3, 2001, Herbstein's counsel filed a motion with the District Court asking for the dismissal of Bruetman's appeal under Rule 54 (b) of the Fed. Rules of Civ. P. based on the fact that Counts III, IV and V of the Amended Adversary Complaint were still pending.

Such legal conduct falls in the category of Judicial Estoppel. The doctrine of judicial estoppel provides that a party who prevails on one ground in a lawsuit cannot repudiate the ground in order to have a second victory based on contradictory ground. Ogden Martin Systems of Indianapolis, Inc. v. Whiting Corp., 179 F.3d 523 (7th. Cir. 1999.) General guidelines controlling Judicial Estoppel: the later position must be clearly inconsistent with the earlier position; the facts at issue should be the same in both cases; and the party to be estopped must have convinced the first to adopt its position. Levinson v. United States, 969 F. 2d 260, 264-65 (7th Cir. 1992). "Judicial Estoppel" generally prevents a party from prevailing in one phase of the argument and then relying on a contradictory argument to prevail in another phase. State of New Hampshire v. State of Maine, 121 S. Ct. 1808 (2001)

Herbstein has not only engaged in a legal conduct subject to Judicial Estoppel but also as Forum Shopping. The Bankruptcy Court opinions were taken to two different District Courts within the same jurisdiction trying to enforce a judgment that had not met the legal requirements. Judge Lindberg case 92-7948; Judge Kocoras case Number 01-5305. If it is allowed that two courts can consider interdependent actions between the same parties it will be comparable to Forum Shopping. Hartford Acc. Co. v. Chicago Housing Authority, 1991 WL 38692 (7th. Cir. 1991).

The Courts below by failing to perform the *de novo* review erred as matter of law.

**Dischargeabilty and the Automatic Stay**

The automatic stay of the Bankruptcy Code contains no exception for no-dischargeable debts. There are at least 13 exceptions to the automatic stay listed in sect. 362(b) of the Code, but collection of debts under 523 determined by the court as not dischargeable is not one of them. "Section 362(d) conspicuously lacks any automatic termination of the automatic stay for a judgment creditor of a no-dischargeable judgment. The only automatic termination of the automatic stay is provided in subsection 362(c)(1), where property has ceased to be property of the estate, such as sale by foreclosure. All other creditors continue to be subject to the automatic stay until it lifts under section 362 (c)(2) or until the court awards relief from the stay." Cardillo v. Moore-Handley, Inc., 172 B.R. 146. (Bkrtcy. Court N.D. Georgia 1994). Further, Cardillo has superseded Embry that the Bankruptcy Court cites (App. A 20), that also conflicts with In Re Hulvey, 102 B. R. 703 (C.D. Ill. 1988).

Non-dischargeabilty judgment has two parts: determination of amount of debt and declaratory judgment that debt is not subject to discharge, and neither determination of amount of debt or declaratory judgment of non-dischargeabilty constitutes relief of automatic stay. Cardillo *146. "Automatic stay which issued when judgment debtor

filed for bankruptcy applied to other proceedings, including appeal, in case giving rise to judgment, even though debtor had filed supersedeas bond in connection with appeal." Sheldon v. Munford, Inc., 902 F.2d 7 (7th.Cir.1990).

**Cooperation Policy among Creditors.**

The Cooperation policy of the Bankruptcy Code of encouraging collective action is one of the more important stratagems embodied in the Code and it is necessary to bring order to the process. The decisions below contravene that policy.

Equating determination of non-dischargeabilty with "denial of discharge" vindicated no bankruptcy policy but instead undermines fundamental policy of cooperation among creditors, otherwise would encourage creditors to pursue nondischargeabilty action to get a head start on collection. 11 U.S.C.A. sec. 362 (2), 523, 727 cited by Cardillo. Requiring diligent creditor holding pre-petition judgment to wait until discharge is denied and automatic stay is lifted to pursue collection while allowing creditor with *default* judgment under non-dischargeability provisions of the Bankruptcy Code to have free hand to execute on its post-petition judgment, even though that creditor purports to represent all creditors, would be at odds with the cooperation policy which is treating similarly situated creditors alike. Id.Cardillo *151. This is contrary to fundamental policy of cooperation among creditors. 11 U.S.C. Sec. 726 does not provide any priority under the distributive scheme for creditors holding nondischargeable debts.

**Effects of the Judgments on the Creditors.**

On July 9, 1999, all creditors we reserved with the Notice of Discharge.

A revoking discharge order was not entered pursuant to Fed. Rules Bk. P. 4006 as required by the Code.

## STANDING AS CREDITOR.

**Late Filing of Proof of Claims after bar date has expired**

The aim of Chapter 7 liquidation is the prompt closure and distribution of the debtor estate, therefore "excusable neglect" standard would not apply to any Chapter 7 case. Pioneer Investment Services Co. v. Brunswick Associates, Ltd. Partnership, 113 S. Ct. 1489*389 (1993).

"The legislative history indicates that the burden of proof on the issue of establishing claims was left to the Rules of Bankruptcy Procedure; citations omitted". Raleigh, Chapter 7 Trustee, v. Illinois Department of Revenue 120 S. Ct. 1951 (2000) [FN2]. The F. Rules of Bk. P. 3001(f) establishes that proof of claims is "prima facie evidence of the validity and the amount of claim". F. Rules of Bk. P. 3002 (a) states: "An unsecured creditor or an equity holder must file a proof of claim." (Underlined by Petitioner). The Act and the corresponding amendment to F. R. Br. P. 3002 do not grant the Court authority to extend the time for filing a proof of claim in Chapter 7 cases after the bar date has passed. *Bankruptcy Reform Act of 1994* Pub. L. No. 103-394. cited In Re Gleenwood Medical Group, Ltd., 211 B.R. 282 (Bank. Court N.D. Ill. 1997). The creditors' mere participation in Chapter 7 cases in filing an adversary complaint to determine dischargeability of debt and obtaining a favorable judgment by Bankruptcy Court, could not be deemed "informal proof of claim," such as might permit creditors to share in the distribution of estate. In Re Wigoda, 234 B.R. 143*416 (N.D.Ill. 1999).

There is a conflict of interpretation regarding the interaction of 11 U.S.C. 501, 502 and F.R.Bkr. P. 3001 (f) and 3002. In re Hausladen,, 146 B. R. 557 (Bankr. D. Minn.) and In re Zimmerman, 156 B.R. 192 (Bankr. W.D.Mich 1993) and In re Tucker, 174 B.R. 732 (N.D. Ill.1994). However, the issue in conflict refers to timeliness, untimeliness and allowance of the claim. In the case at bar Respondent Herbstein has not even attempted to file a proof of claim.

Since filing proof of claim is an essential element; Herbstein has no standing in any distribution of the estate.

If Respondent, by operation of law has no Standing as Creditor of the Bankrupt Bankruptcy Estate, what is his standing, if any? In Raleigh the Supreme Court has indirectly addressed the issue, the matter of standing by creditors is an important question in need of clarification by the Supreme Court also in light of the conflicts between District Courts as described above.

Herbstein's responses in his Appellee brief (@13): "The fact that Herbstein chose not to file a claim in bankruptcy against that bankruptcy estate, which contains no assets, is meaningless. Herbstein seeks no share of that estate. He seeks to find assets that Bruetman concealed from the bankruptcy court and the trustee in bankruptcy. He also seeks to enforce his judgment against assets that Bruetman acquired or has an interest in after his petition in bankruptcy was filed."

Herbstein's counsel allegations and assertions are material as matter of law.

In May 2000 the Trustee set as August 3, 2000 the deadline to file proof of claims. In his statement the Trustee states "it is now apparent that may be available some dividends to distribute." (Case No.99-099107 dock. # 28) Herbstein's counsel statement has not support on facts available to him as of August 3, 2000. His statement lacks foundation. Any deliberate, clear and unequivocal statement either written or oral, made in a course a judicial proceedings qualifies as "judicial admission" In re Lefkas G. Partners N 1017, 153 B.R. 804 (N.D. Ill. 1993). Further, all creditors as matter of law have access to post-petition assets in a case that the discharge has been denied. Does Herbstein as matter of law have any priority or standing?

The assertions in reference to hidden assets are contrary to operation of law. Any pre-petition hidden asset belongs to the estate (App. A 21) If Herbstein had any evidence in support of such allegation it is his legal obligation to notify

the court and/or the trustee. Herbstein's counsel alleged Bruetman's hidden assets since November 16, 1999 (Tr. Hearing 11/16/99) until the present. No evidence has been provided and when the Court ordered him to bring the Trustee to a hearing he failed to do so. (Tr. Hearing 6/11/01). Herbstein has failed to preserve any argument for appellate review. Failure to cite any factual or legal basis for an argument waives it. Gagan v. American Cablevision, Inc. 77 F.3d 952, 965 (7th. Cir 1996) Argument that is not developed in any meaningful way is waived. Bratton v. Roadway Package Sys. Inc., 77 F.3d 168, 173 n.1 (7th Cir. 1996). In this Circuit it is clear "[a] litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite lack of supporting authority or in the face of contrary authority, forfeits the point" Pelfresne v. Village of Williams Bay, 917 F. 2d 1017, 1023 (7th. Cir 1990).

The assertions have not been accompanied by any supporting citation authority or by any statute.

**Judicial Notice**

The Court of Appeals denied Petitioner's motion for taking Judicial Notice of an Order entered by the Bankruptcy Court in March 2001. In the Adversary proceeding under the caption: Martin E. Bruetman v. SSA and its Commisioner (99B09107; 99A00945) the same Bankruptcy Court sanctioned the SSA for violation of 11 U.S.C 362(a). The order entered by the Bankruptcy Court is incongruent with its ruling of June 13, 2001, affirmed by the Appellate Courts, setting July 8, 1999 as the lifting of the automatic stay. The denying order by the Court of Appeals conflicts with its own previous opinions and other jurisdictions; U.S. v. Marren, 890 F. 294 (7th. Cir. 1989); Locicero v. Leslie, 948 F. Supp 10, 12 (D. Mass. 1996); Citizens for a Better En't-Cal. V. Union Oil Co., 861 F. Supp 889, 896 (N.D. Cal. 1994), affirmed 83 F. 3d 1111 (9th. Cir. 1996), and with Sections 201(a),(b),(c) and (f) of the Federal Rules of Evidence. Petitioner has been deprived of due process of law.

## CONFLICT OF INTEREST

Herbstein's counsel is defending himself against a motion for violation of 11 U.S.C. Sect. 362. His arguments are implicitly and explicitly supporting the position that Bruetman has been discharged on July 8, 1999, consequently counsel could not be sanctioned. However his legal position may be in conflict with his client's best interest. Herbstein's Counsel to protect himself from sanctions due to his legal misconduct may have used arguments that are conflicting without a waiver by his client. Petitioner is not interested in protecting Respondent's interests, but Petitioner is harmed by Counsel's conduct with the concurrence of the Courts below, which are supposed to guard against such transgressions.

## CONCLUSION

The questions presented involve important issues of law. They address opinions that conflict with important sections of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure; conflicts between different jurisdiction opinions regarding the matter of timeliness for filing Proof of Claims and its effect on the standing of creditors before the debtor's estate as well as the rights vis- a- vis post-petition assets. The denial of a motion to take judicial notice and Petitioner due process of law is in need of an answer.

For all the above stated reasons, this Petition for Writ of Certiorari should be granted.

Respectfully Submitted

Martin E. Bruetman M.D. Pro Se
77 W. Huron St. #214
Chicago. Illinois 60610
Telephone: 312 944 0782

**UNPUBLISHED ORDER**
**Not to be cited per Circuit Rule 53**

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Submitted March 25, 2002*
Decided April 5, 2002

Before
Hon. Frank H. Eaterbrook, Circuit Judge

Hon. Terence T. Evans, CircuitJudge

Hon. Ann Claire Williams, Circuit Judge

| | | |
|---|---|---|
| Diego J. Herbstein | ) | Appeals from the United |
| *Plaintiff-Appellee,* | ) | States District Court for |
| | ) | The Northen District of |
| Nos. 01-3583 &01-3587 v | ) | Illinois, Eastern Division. |
| | ) | |
| Martin E. Bruetman | ) | Nos.01-2829, 5305 |
| *Defendant-Appellant.* | ) | Charles P. Kocoras, *Judge.* |

**Order**

For more than a decade, Diego Herbstein has been trying to collect a multimillion dollar judgment against Martin Bruetman. *Herbstein v. Bruetman* 241 F.3d 586 (7th. Cir.2001), the most recent episode to reach this court, narrates a small part, the contretemps. We recounted there that

---

* These appeals have bee submitted to the panel that heard the most recent related appeal. See Operating Procedure 6(b). After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. See Fed. R. App. P 34 (a); Cir. R. 34 (f)

Bruetman had asked the bankruptcy court to discharge the debt too Herbstein, and that the bankruptcy judge has declined. *In re Bruetman,* 259 B.R. 649 (Bankr.N.D.Ill. 2001). Since then , the district court has affirmed this decision, 266 B.R. 676 (N.D.Ill. 2001), and has denied Bruetman's request for sanctions against Herbstein for what Bruetman calls a violation of the automatic stay in bankruptcy. In appeal No.01-3583 Bruetman contests the non-discharge decision, and No. 01-3587 concern sanctions.

We directed the parties to address in No. 01-3583 the question whether we have appellate jurisdiction. The responses show that we do. The adversary action concerning dischargeability has been concluded, and the bankruptcy itself is closed. The decision thus its final and appealable. 28 U.S.C Sec. 158(d). On the merits we affirm the reasons given by the district judge. Likewise we affirm in No. 01-3587 for the reasons stated by the district court. Bruetman must stop litigating and start cooperating in the repayment of this debt.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 30 2002

Before

Hon. Frank H. Eaterbrook, Circuit Judge

Hon. Terence T. Evans, CircuitJudge

Hon. Ann Claire Williams, Circuit Judge

| | | |
|---|---|---|
| Diego J. Herbstein | ) | Appeals from the United |
| *Plaintiff-Appellee,* | ) | States District Court for |
| | ) | The Northen District of |
| Nos. 01-3583 &01-3587 v | ) | Illinois, Eastern Division. |
| | ) | |
| Martin E. Bruetman | ) | Nos.01-2829, 5305 |
| *Defendant-Appellant.* | ) | Charles P. Kocoras, *Judge.* |

**Order**

Defendant-appellant filed a petition for rehearing and rehearing en banc on April 19, 2002. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore **DENIED**

## ORDER

Before the Court is Dr. Martin Bruetman's appeal from the Bankruptcy Court's Order affirming his discharge from bankruptcy, denying his motion to stay proceedings pending appeal, and denying his motion for sanctions against opposing counsel. We review the Bankruptcy Court's decision de novo and affirm.

On July 8, 1999, the Bankruptcy Court entered an order discharging Bruetman's debts. Plaintiff Herbstein filed an Amended Adversary Complaint on June 25, 1999 seeking to deny Bruetman's discharge and to determine the dischargeabilty of a debt evidenced by a default judgment against Bruetman enter in the Southern District of New York, on August 10, 1992. On March 8, 2001, the Bankruptcy Court granted Herbstein's motion for summary judgment on Count I and II, both of which allege the nondichargeabilty of the debt, and denied Bruetman's cross-motion for summary judgment. In a companion case (01 C 2829) Bruetman has appealed both the granting of Herbstein's motion for summary judgment and the denial of his cross-motion for summary judgment. We disposed of that appeal in a companion Memorandum Opinion.

Whereas Bruetman retained counsel to draft his appellate brief in the companion brief, Bruetman appears pro se on the instant appeal. Although we construe his pro se complaint liberally, as we are required to do, we nonetheless find it meritless. Bruetman maintains that he is entitled to a stay subsequent to the Bankruptcy Court's order discharging his debts. Such proposition flies in the face of express statutory language and defies common sense. The Bankruptcy Code provides an automatic stay to those who file bankruptcy petitions in order to stop collection of debts until the merits of the bankruptcy termination are determined. See 11 U.S.C Sec. 362(a). That stay is lifted, however upon, the entry of a discharge order. See Sec. 362 (c) (2)(C) (stating that for

Chapter 7 petitions, the stay continues until a discharge is granted or denied). The Bankruptcy Court granted the discharge of Bruetman's debts on July 8, 1999. As of that date, the stay was terminated. To find otherwise would unfairly hamper the collection efforts of creditors who have patiently awaited resolution of the discharge proceedings.

In sum, the Bankruptcy Court accurately confirmed the date of Dr. Bruetman's discharge in bankruptcy and properly denied the motion to stay pending appeal. Sanctions were not warranted against opposing counsel. In all regards the Bankruptcy Court's orders are affirmed.

Dated: September 6, 2001 Handwritten signature

"s/ CHARLES P. KOCORAS"

U.S. District Court Judge

**UNITED STATES BANKRUPTCY COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

Name of Presiding Judge, Honorable Jack B. Schmetterer

Cause No. 99 B 09107 Adversary No. 99 A 00811
Date June 18, 2001

Title of Cause IN RE MARTIN E. BRUETMAN, Debtor

DIEGO HERBSTEIN v. MARTIN BRUETMAN

Brief Statement

Of Motion ORDER OF COURT

**ORDER**

Motions of Defendant Martin Bruetman for sanctions and reconsideration are entirely denied for reasons stated from the bench on June 13, 2001 and today.

**ENTER:**

Handwritten signature
"s/ J. Schmetterer"
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | | |
|---|---|---|
| In re:)<br>Martin E. Bruetman M.D. | ) | Chapter 7 |
| | ) | No. 99 B 09107 |
| Debtor | ) | |
| Diego Herbstein<br>Plaintiff, | ) | |
| vs. | ) | Adversary No. 99 A 00811 |
| Martin Bruetman,<br>Defendant. | ) | Judge Schmetterer |

ORDER (Dismissing Counts III IV V handwritten)

This Court having entered judgment on Count I and II of the Amended Adversary Complaint, and it appearing that the remaining counts of the Amended Adversary Complaint, as to Plaintiff, are moot, and the Plaintiff requested therefore, by motion, to voluntarily dismiss Count III, IV and V thereof.

**IT IS HEREBY ORDERED** that Count III, Count IV and Count V of the Amended Adversary Complaint be and same are hereby dismissed without prejudice.

Dated: March 27 [erased], 2001
April 24,

Richard E. Steck
Ricahrd E. Steck, P.C.
Triangle Plaza at O'Hare
8770 West Bryn Mawr Suite 1300
Chicago Illinois 60631

handwritten signature
"s/ J. Schmetterer"
United States
Bankruptcy Judge

**UNITED STATES COURT OF APPEALS**

*For the Seventh Circuit*
*Chicago, Illinois 60604*

March 6, 2002

By the Court

| | |
|---|---|
| IN RE: | ] Appeal from the United |
| | ] States District Court for |
| Martin E. Bruetman, Doctor | ] the Northern District of |
| Debtor-Appellant | ] Illinois, Eastern Division. |
| | ] |
| No. 01-3587 | ] No. 01-5305 |
| | ] |
| | ] Charles P. Kocoras |
| | ] Judge |

The following are before the court:

1. Motion Asking Leave From the Court to File Amended Page to Brief of Appellant, filed on February 4, 2002, by the prose appellant.

2. Motion Asking the Court to Take Judicial Notice, filed on February 26, by pro se appellant.

It is ordered that #1 and # 2 are **DENIED**

28 U.S.C. SECTION 1254 (1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. SECTION 1291

The court of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United shall be limited to the States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and 1295 of this title.

28 U.S.C. SECTION 1334(b)

Notwithstanding any act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

Federal Rules of Bankruptcy Procedure.

3001(f) *Evidentiary Effect.* A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.

3002 (a) *Necessity for Filing.* An unsecured creditor or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003,3004 and 3005.

Fed. Rules of Bk. P. 4004 (a) (b)

(a) Time for Filing Complaint Objecting to Discharge; Notice of Time Fixed. In a Chapter 7 liquidation case a complaint objecting to debtors discharge under Sec. 727 (a0 of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors pursuant to Sec. 341(a)

(b) Extension of time. On motion of any party in interest, after hearing on notice, the court may extend for cause the time for filing a complaint objecting to discharge. The motion shall be made before such time expired.

Fed. Rules Bk. P. 4006. Notice of Discharge.

If an order is entered denying or revoking a discharge or if a waiver of discharge is filed, the clerk, after the order becomes final or the waiver is filed shall promptly give notice to all creditors in the manner provided by Rule 2002.

Fed. Rules of Bk. P. 7001(4). The adversary proceeding is governed by this Rules VII....(4) to object to or revoke a discharge...

Fed. Rules Civ. P. 54(b) pertinent

Judgment Upon Multiple Claims or Involving Multiple Parties. When one or more claims for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all claims or parties only upon an express determination and direction that there is no just reason for delay and upon an express direction for the entry of judgment.

Fed. Rules Civ. P. Rule 69 (a) Execution

(a) IN GENERAL. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

ILLINOIS SUPREME COURT RULE 277 (a), (f). Supplementary Proceedings. Pertinent.

(a) When Proceeding May be Commenced and Against Whom; Subsequent Proceeding Against Same Party.

A supplementary proceeding authorized by section 2-1402 of the Code of Civil Procedure may be commenced at any time with respect to a judgment, which is subject to enforcement. The proceeding may be against the judgment debtor or any third party the judgment creditor believes has property of or is indebted to the judgment debtor. If there has been a prior supplementary proceeding with respect to the same judgment against the party, whether he is the judgment debtor or a third party, no further proceeding shall be commenced against him except by leave of court. The leave may be granted upon ex parte motion of the judgment creditor, but only upon finding by the court, based upon affidavit of the judgment creditor or some other person, having personal knowledge of the facts, (1) that there is reason to believe the party against whom the proceeding is sought to be commenced has property or income the creditor

is entitled to reach, or, if a third party, is indebted to the judgment debtor, (2) that the existence of the property, income or indebtedness was not known to the judgment creditor during the pendency of any prior supplementary proceeding, and (3) that the additional supplementary proceeding is sought in good faith to discover assets and not to harass the judgment debtor or third party.

(f) When Proceeding Terminated.

A proceeding under this rule continues until terminated by motion of the judgment creditor, order of the court, or satisfaction of the judgment, but terminates automatically 6 months from the date of (1) the respondent's first personal appearance pursuant to the citation or (20 the respondent's first personal appearance pursuant to subsequent process issued to enforce the citation, whichever is sooner. The court may, however, grant extensions beyond the six months, as justice may require. Orders for payment of money continue in effect notwithstanding the termination of the proceedings until the judgment is satisfied or the court orders otherwise. Committee

Comments: This is former Rule 24 without change in substance, except for changing 30 days to 28 days in paragraph (f).

11 U.S.C. s 362 (a) (h)

Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) The commencement or continuation, including the issuance or employment process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor

that arose before the commencement of the case under this title.

(2) The enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title.

(3) Any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.

(4) Any act to create, perfect, or enforce any lien against property of the estate.

(5) Any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title.

(6) Any act to collect, assess, or recover a claim against the debtor that arose before the commencement under this title.

(7) The setoff of any debt owing, to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) The commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(c) Except as provided in subsection (d), (e), and (f) of this section—

(1) the stay of an act against proprerty of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection(a) of this section continues until the earliest of—

(A) the tirne the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied..

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages.

11 U.S.C. Sec. 501. Filing proofs of claims or interests. Pertinent.

(a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.

(b) If a creditor does not timely file a proof of such creditor's claim, an entity that is liable to such creditor with the debtor, or that has secured such creditor, may file a proof of such claim.

(c) If a creditor does not timely file a proof of such creditor's claim, the debtor or trustee may file a proof of such claim

11 U.S.C. Sec. 502. Allowance of claims or interest. Pertinent.

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in case under chapter 7 of this title object.

(b) Except as provided in subsections (e) (2), (f), (g), (h) and (i) of this section, if such objection to a claim is made the court, after notice and a hearing shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—or

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of

the section 726 (a) of this title or under the Federal Rules of Bankruptcy Procedure...

11 U.S.C. Sec. 726. Distribution of property of the estate. Pertinent

(a) Except as provide in section 510 0f this title, property of the estate, shall be distributed-

(1) first, in payment of claims of the kind specified in, and in the order specified in section 507 of this title, proof of which is timely filed under section 501 of this title or tardily, filed before the date on which the trustee commences distribution under this section;

(2) second, in payment of any allowed unsecured claim other than a claim of a kind in paragraph (1), (3) or (4) of this subsection, proof of which is--

(A) timely filed under section 501 (a) of this title;

(B) timely filed under section 501 (b) or 501 (c) of this title; or

(C) tardily filed under section 501 (a) of this title, if-

(i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and

(ii) proof of such claim is filed in time to permit payment of such claim;

(2) third, in payment of any allowed unsecured claim proof which is tardily filed under section 501 (a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection.

11 U.S.C. Sect. 727 (a) (pertinent)

"The Court shall grant the debtor a discharge, unless" ...(10) (b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of discharge order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 502 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

11 U.S.C 523: Exception to Discharge.

523 (a) "A discharge under section 727,....of this title does not discharge an individual debtor from any debt--- under section (2)(A) and (4)."

11 U.S.C. 524. Effect of discharge.

(a) A discharge in a case under this title-

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharge

(2) under section 727, 944, 1141, 1228 or 1328 of this title, whether or not the discharge of such debt is waived;

(b) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or no not discharge of such debt is waived; and operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset

against, property of the debtor of the kind specified in section 541 (a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228 (a)(1), or 1328 (a)(1) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

Federal Rules of Evidence. (Pertinent)

Article II. Judicial Notice

Rule 201 Judicial Notice of Adjudicative Facts

(a) Scope of rule. — This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. — A judicially noticed fact must be one not subject to reasonable dispute in that is either (1) generally known to the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination to sources whose accuracy cannot reasonable be questioned

(c) When discretionary. — A court may take judicial notice whether requested or not

(d) When mandatory. — A court shall take judicial notice if requested by a party and supplied with the necessary information

(f) Time of taking notice. — Judicial notice may be taken at any stage of the proceeding.

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | |
|---|---|
| In re:<br>Martin Bruetman,<br>1300 N. Lake Shore Dr. No. 12B<br>Chicago, Illinois 60610 | )<br>)<br>)<br>)<br>) Case Number:<br>) 99- 09107<br>) |
| Debtor | ) |
| Social Security No(s):<br>Debtor 278-38-4026 | ) |

DISCHARGE OF DEBTOR

It appearing that the debtor is entitled to a discharge.

IT IS ORDERED:

The debtor is granted a discharge under section 727 of title 11, United States Code (the Bankruptcy Code)

FOR THE COURT

Dated:
July 8, 1999

Wayne E. Nelson, Clerk
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| In re: | ) | |
| | ) | |
| Martin Bruetman, | ) | No.: 99 B 09107 |
| | ) | |
| Debtor | ) | |
| | ) | |
| Diego Herbstein, | ) | No. 99 A 811 |
| Plaintiff, | ) | |
| v. | ) | |
| | ) | Chicago, Illinois |
| Martin Bruetman, | ) | June 11, 2001 |
| Defendant, | ) | 9.00 a. m. |
| | ) | |

EXCERPT OF PROCEEDINGS TRANCRIPT
BEFORE THE HONORABLE JACK B. SCHMETTERER

**THE COURT**: Okay. I follow the ruling of the Sixth Circuit In Re Embry, 10 F. 3d 401 (6th. Cir.1993). And basically, the holding after its reasoning is that once a bankruptcy court enters its judgment holding a debt nondischargeable, the automatic stay does not preclude execution of the judgment against the property of the estate. Now, you have started this citation business, right after the bankruptcy was filed.

**MR. GLASGOW**: Or before. But I don't know what are you trying to get, and it seems to me that the stay still bars you from seeking any action against the property of the estate. And it seems to me that unless the trustee abandons some property of the estate and I modify the stay, once there is abandonment you may not proceed against property that is property of the estate or might have been.

So we have got to sort this out. I will quash your citation on grounds that under the circumstances you have not defined what property you are seeking to obtain a citation against. I should not say quash it. I will not permit you to go forward with it until you have define with precision the property you are seeking to go against…

**THE COURT**: But I believe the proper reasoning is the Sixth Circuit. The provision you rely on is discussed by the Six Circuit. It could be read I think Altenberger and others read it to apply only to the circumstances where the discharge is either granted or denied and then you can go forward against any. The stay no longer applies. But that hasn't happened here yet, right? Has he gotten a discharge?

**MR. GLASGOW**: I believe this

**THE COURT**: Has obtained a discharge?

**MR. GLASGOW**: From the entire bankruptcy?

**THE COURT**: Sir, has a discharged entered?

**MR. GLASGOW**: I don't think so.

**MR. BRUETMAN**: No your Honor.

**THE COURT**: You have

**THE COURT**…..I don't your discharge is entered. You have not shown me the citation that was served, which I would like to bring in… So I can read out….So

I will see what you are trying to get…It would have been easier if you had come first.

After Mr. Glasgow Confirming that the purposes for dismissing Counts III, IV and V without prejudice was to preserve their objection was to preserve their objection to Bruetman's discharge pending appeal.

**THE COURT**: Yes, he is party.

Now, in that case, I have previously entered summary judgment for the plaintiff in Count I and II. On the plaintiff's motion I have previously dismissed the remaining counts on the plaintiff without prejudice. The plaintiff wanting it to be without prejudice because in case my judgment is reversed they want to come back here.